

1 Geoffrey S. Sheldon, Bar No. 185560
2 gsheldon@lcwlegal.com
3 Elizabeth T. Arce, Bar No. 216687
4 earce@lcwlegal.com
5 Alex Y. Wong, Bar No. 217667
6 awong@lcwlegal.com
7 Victor D. Gonzalez, Bar No. 345477
8 vgonzalez@lcwlegal.com
9 LIEBERT CASSIDY WHITMORE
10 A Professional Law Corporation
11 6033 West Century Boulevard, 5th Floor
12 Los Angeles, California 90045
13 Telephone: 310.981.2000
14 Facsimile: 310.337.0837
15
16 Attorneys for Defendants COUNTY OF LOS ANGELES
17 and ANTHONY C. MARRONE

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

12 BRYAN HUBBARD, individually
13 and on behalf of all others similarly
14 situated,

15 Plaintiffs,

16 v.

17 COUNTY OF LOS ANGELES, a
18 public entity; ANTHONY C.
19 MARRONE, Chief of Los Angeles
20 County Fire Department, and DOES
21 1 through 100, inclusive,

22 Defendants.

Case No.: 2:23-cv-03541-PA (RAOx)

Complaint Filed: March 8, 2023

FAC Filed: June 22, 2023

**DEFENDANTS' OPPOSITION TO
PLAINTIFFS' MOTION FOR RELIEF**

Date: June 3, 2024

Time: 1:30 p.m.

Courtroom: 9A

22 Defendants COUNTY OF LOS ANGELES and ANTHONY C. MARRONE
23 (collectively “County” or “Defendants”), by and through their attorneys of record,
24 hereby oppose Plaintiff Bryan Hubbard and the Opt-in Plaintiffs’ (collectively
25 “Plaintiffs”) Motion for Relief to equitably toll the statute of limitations for their
26 FLSA claims from the filing of their Consent to Join forms on January 30, 2024
27 back to the date of the filing of the initial collective action complaint on March 8,
28 2023.

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LIBERT CASSIDY WHITMORE
A Professional Law Corporation
6033 West Century Boulevard, 5th Floor
Los Angeles, California 90045

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LIEBERT CASSIDY WHITMORE
A Professional Law Corporation
6033 West Century Boulevard, 5th Floor
Los Angeles, California 90045

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiffs Motion for Relief (“Motion”) to equitably toll the statute of limitations for their FLSA claims from the filing of their Consent to Join forms on January 30, 2024 back to the date of the filing of the initial collective action complaint on March 8, 2023 should be denied because Plaintiffs do not support their Motion with case law applicable in the Ninth Circuit. The case Plaintiffs rely on to support their Motion, *Guy v. Absopure Water Co., LLC*, 2023 U.S. Dist. LEXIS 208546, at *12 (E.D. Mich. 2023), is an unpublished Eastern District of Michigan case which was recently decided. The application of equitable tolling in *Guy* is premised on the one-step approach using a heightened standard for determining whether to certify collective actions employed in the Sixth Circuit pursuant to *Clark v. A&L Homecare & Training Ctr., LLC*, 68 F.4th 1003, 1011 (6th Cir. 2023). In the Ninth Circuit, a two-step approach, with a lenient first step in conditionally certifying a collective action is used. (*Campbell v. City of Los Angeles*, 903 F.3d 1090, 1110 (9th Cir. 2018).) Plaintiffs do not provide any Ninth Circuit precedent to support the application of equitable tolling for FLSA collective actions. Additionally, the principles underlying Rule 23 which were relied upon in *Guy* in applying equitable tolling do not apply in the Ninth Circuit due to its two-phased approach to FLSA collective action certification. Plaintiff’s Motion should be denied because it also does not include a Certificate of Compliance and the Motion is an attempt to circumvent the word and page limit of Plaintiffs’ Opposition to Defendants’ Motion for Summary Judgment (“MSJ”). Further, Plaintiffs previously requested equitable tolling in its Motion for Conditional Certification of FLSA Collective Action to the date of the filing of that motion. Plaintiffs are now taking the clearly inconsistent position that a request for equitable tolling must be brought by a standalone motion and that tolling should date back to the filing of the collective action complaint. Plaintiffs should be

1 judicially estopped.

2 **II. RELEVANT PROCEDURAL HISTORY**

3 Plaintiffs filed their FLSA collective action complaint on March 8, 2023
 4 (Dkt. No. 1-1). Nearly seven months later, on September 25, 2023, Plaintiffs filed
 5 their Motion for Conditional Certification of FLSA Collective Action.¹ (Dkt. No.
 6 27.) In that motion, Plaintiffs asked this Court to toll the statute of limitations
 7 beginning on the date of their motion through the end of the opt-in period. (*Id.* at p.
 8 16:8-9.) This Court, in its order granting Plaintiffs' motion, denied Plaintiffs'
 9 request for equitable tolling, finding that there were no extraordinary circumstances
 10 or misconduct that warranted tolling. (Dkt. No. 32, pp. 6-7.) The notice of the
 11 FLSA collective action and Consent to Join forms were sent to potential opt-in
 12 plaintiffs on November 24, 2023 and were filed with this Court on January 30,
 13 2024. (Dkt. No. 39-1, p. 2:15-25.) On April 8, 2024, Defendants filed a Motion for
 14 Summary Judgment, which argued, in part, that equitable tolling of the statute of
 15 limitations is not warranted in this case. (Dkt. No. 41.) Instead of addressing the
 16 merits of Defendants' arguments regarding the inapplicability of equitable tolling to
 17 this case, Plaintiff stated they would move for equitable tolling through a
 18 standalone motion that would be filed April 29, 2024. (Dkt. No. 47, p. 16:5-7.)
 19 Plaintiffs' filed the present Motion for Relief ("Motion") on May 6, 2024, renewing
 20 their request for equitable tolling. However, Plaintiffs now request that this Court
 21 toll the statute of limitations back to the filing of the collective action complaint
 22 (March 8, 2023), relying on an unpublished Eastern District of Michigan case, *Guy*
 23 *v. Absopure Water Co., LLC*, 2023 U.S. Dist. LEXIS 208546, at *12 (E.D. Mich.
 24 2023), which was recently decided in November 2023.

25
 26
 27 ¹ Plaintiffs filed their Motion for Conditional Certification of FLSA Collective
 28 Action the *very last* possible day to file the motion in compliance with the
 Court's order setting the deadline to hear the motion. (Dkt. No. 21.)

III. LEGAL STANDARDS

A. FLSA COLLECTIVE ACTION CERTIFICATION IN THE NINTH CIRCUIT RELIES ON A TWO-STEP APPROACH

As set forth in this Court’s order granting conditional FLSA collective action certification, in the Ninth Circuit, courts follow a two-step process for certification of an FLSA collective action. (*Campbell*, 903 F.3d at 1110; Dkt. No. 32, p. 2.) The first step in the process occurs when plaintiffs move for preliminary, or conditional, certification *at or around the pleading stage*. (*Id.* at 1109-10.) A court’s decision whether to conditionally certify the collective action relies on a determination of whether the potential opt-in plaintiffs are “similarly situated.” (*Id.* at 1110-11.) In making this determination, courts apply a “fairly lenient” standard, which “typically results in certification.” (*Javine v. San Luis Ambulance Service, Inc.*, 13-CV-07480, 2015 WL 12672090, at *6 (C.D. Cal. Jan. 13, 2015).) “The sole consequence of conditional certification is the sending of court-approved written notice to employees, who in turn become parties to a collective action *only by filing written consent with the court*.” (*Genesis Healthcare Corp. v. Symczyk*, 569 U.S. 66, 75, 133 S. Ct. 1523 (2013) (emphasis added).)

The second step in the process for conditional certification involves defendants moving to decertify the collective action. (*Saleh v. Valbin Corp.*, 297 F. Supp. 3d 1025, 1030 (N.D. Cal. 2017).) This step occurs only after potential opt-in plaintiffs have received notice of the collective action and discovery has been completed. (*Labrie v. UPS Supply Chain Solutions, Inc.*, C 08-3182, 2009 WL 723559, at *10-12 (N.D. Cal. Mar. 18, 2009).) In deciding whether to decertify the collective action, courts reevaluate the “similarly situated” question under a “stricter standard.” (*Juvera v. Salcido*, 294 F.R.D. 516, 519-520 (D. Ariz. 2013).)

B. FLSA COLLECTIVE ACTION CERTIFICATION IN THE SIXTH CIRCUIT RELIES ON A STRICTER STANDARD

In contrast, the Sixth Circuit has eliminated the two-step process for FLSA

1 collective action certification and instead the named plaintiffs must show a “strong
 2 likelihood” that other employees are similarly situated before facilitating notice of
 3 the lawsuit to other employees. (*Clark v. A&L Homecare & Training Ctr., LLC*, 68
 4 F.4th 1003, 1011 (6th Cir. 2023).) Because of this new heightened standard in
 5 *Clark*, the Sixth Circuit noted that a district court may promptly initiate discovery
 6 relevant to the motion, including if necessary by “court order.” (*Id.*) In *Clark*’s
 7 concurring decision, the Sixth Circuit stated tolling the statute of limitations should
 8 be considered because the “heightened standard … with its concomitant discovery
 9 and requirement to litigate defenses, may significantly lengthen the period before
 10 potential plaintiffs are notified of a pending FLSA lawsuit. As a result, many
 11 potential plaintiffs may not learn of the FLSA action until after the limitations
 12 period for some or all of their claims has run.” (*Id.* at 1012.)

13 **IV. LEGAL ARGUMENT**

14 **A. *GUY IS INNAPPLICABLE IN THE NINTH CIRCUIT***

15 The case Plaintiffs rely on to support their argument for equitable tolling,
 16 *Guy v. Absopure Water Co., LLC*, 2023 U.S. Dist. LEXIS 208546, is wholly
 17 inapplicable in the Ninth Circuit. In Plaintiffs’ Motion, they cite to language in
 18 *Guy* which states “*in light of the heightened standard* under which district courts
 19 are to determine whether plaintiffs are similarly situated announced by Sixth
 20 Circuit’s recent decision in *Clark*, ‘district courts should freely grant equitable
 21 tolling to would-be opt-in plaintiffs.’” (Plaintiff’s Motion, p. 6:12-16, citing *Guy v.*
 22 *Absopure Water Co., LLC*, 2023 U.S. Dist. LEXIS 208546, at *9, emphasis added.)
 23 The Ninth Circuit’s two-step process, set forth in *Campbell*, for FLSA collective
 24 action certification does not rely on the heightened standard set forth in the Sixth
 25 Circuit by *Clark*. As such, Plaintiffs argument as to why this Court should equitably
 26 toll the statute of limitations is premised on factors that are wholly irrelevant to the
 27 process by which the Ninth Circuit certifies collective actions.

28 As explained in *Campbell*, plaintiffs typically seek conditional certification at

1 or around the pleading stage. (*Campbell*, 903 F.3d at 1109.) In contrast to the
 2 heightened standard for the conditional certification process in the Sixth Circuit, in
 3 the Ninth Circuit, courts employ a lenient standard in conditionally certifying a
 4 collective action, which is “sometimes articulated as requiring ‘substantial
 5 allegations,’ sometimes as turning on a ‘reasonable basis,’ but in any event loosely
 6 akin to a plausibility standard, commensurate with the stage of the proceedings.”
 7 (*Id.*, citations omitted.) The heightened standard for collective action certification in
 8 the Sixth Circuit requires discovery *prior* to certification (*Clark*, 68 F.4th 1003 at
 9 1011), whereas in the Ninth Circuit, the courts analysis for collective action
 10 certification occurs pre-discovery and is “typically focused on a review of the
 11 pleadings but may sometimes be supplemented by declarations or limited other
 12 evidence.” (*Campbell*, 903 F.3d at 1109.) The need for equitable tolling in *Guy* is
 13 premised on the fact that conditional certification requires discovery to meet the
 14 court’s heightened standard requiring plaintiffs to show that there is a strong
 15 likelihood that plaintiffs are similarly situated. In the Ninth Circuit, there is no
 16 similar need for equitable tolling due to the two-step collective action certification
 17 process.

18 In addition to *Guy* not being applicable in the Ninth Circuit, this Court
 19 already initiated the two-step process for FLSA collective action certification when
 20 it granted Plaintiffs’ Motion for Conditional Certification of FLSA Collective
 21 Action on October 23, 2023. (Dkt. No. 32.) Additionally, the Opt-in Plaintiffs have
 22 already filed their Consent to Joins forms. (Dkt. No. 39.) The need for equitable
 23 tolling in *Guy* was based on the fact that the Sixth Circuit has a one-step process for
 24 conditional certification and that potential opt-in plaintiffs do not receive notice of
 25 the collective action until after conditional certification. Here, Plaintiffs were
 26 notified of the collection action on November 23, 2023 after the first step of the
 27 collective action certification process. (Dkt. No. 39-1, p. 2:15-16.)

28 For the forgoing reasons, the standard for equitable tolling the statute of

1 limitations in FLSA collective actions set forth in *Guy* is inapplicable in the Ninth
 2 Circuit and the Court should deny Plaintiffs Motion pursuant to case law in the
 3 Ninth Circuit.

4 **B. EQUITABLE TOLLING OF THE STATUTE OF
 5 LIMITATIONS IS NOT WARRANTED**

6 Two general categories of situations warrant equitable tolling: “(1) where the
 7 plaintiffs actively pursued their legal remedies by filing defective pleadings within
 8 the statutory period, or (2) where the defendant’s misconduct induces failure to
 9 meet the deadline.” (*Delgado v. Ortho-McNeil, Inc.* 2007 U.S. Dist. LEXIS 7473, at
 10 * 13 (C.D. Cal. 2007.) Courts may also apply equitable tolling when “when
 11 extraordinary circumstances beyond a plaintiff’s control make it impossible to file a
 12 claim on time.” (*Helton v. Factor 5, Inc.*, No. C 10-04927 SBA, 2011 WL 5925078,
 13 at *2 (N.D. Cal. Nov. 28, 2011) (citing *Stoll v. Runyon*, 165 F.3d 1238, 1242 (9th
 14 Cir. 1999).) “Equitable tolling is extended sparingly and only where claimants
 15 exercise diligence in preserving their legal rights.” (*Adams v. Inter-Con Sec. Sys., Inc.*, 242 F.R.D. 530, 543 (N.D. Cal. 2007).)

16 Here, Plaintiffs’ collective action complaint was filed on March 8, 2023.
 17 (Dkt. No. 1-1.) Approximately 7 months later, on September 25, 2023, the deadline
 18 by which to file the motion, Plaintiffs filed their Motion for Conditional
 19 Certification of FLSA Collective Action. (*See* Dkt. Nos. 21, 27.) Plaintiffs did not
 20 need to conduct discovery before seeking conditional certification, as reliance on
 21 the pleadings is sufficient to move for conditional certification and Plaintiffs could
 22 have filed the preliminary certification motion at the pleading stage or immediately
 23 after Defendants filed their Answer. Furthermore, a related case *Bryan Hunt v. City*
 24 *of Los Angeles*, United States District Court Case No. 2:21-CV-06059 PA (RAOx)
 25 (“Hunt Litigation”), was based on the same sets of facts as the present case,
 26 represented by the same Counsel as the present case, and was also filed as a
 27 collective action complaint. In the present case, Plaintiffs did not exercise diligence

1 in preserving their legal rights and should have sought conditional certification at or
 2 near the time of filing the collective action complaint, especially with the
 3 knowledge dating back to the *Hunt* Litigation, that conditional certification would
 4 be sought based on the facts of the case.

5 **C. RULE 23 AND ITS UNDERLYING PRINCIPLES ARE
 6 INNAPPLICABLE**

7 Plaintiffs, in arguing that the standard for equitable tolling in *Guy* should be
 8 applied to the facts of this case, rely on the *Guy* court's adoption of a rule similar to
 9 that in the class action context where a class member's claim relates back to the
 10 filing of the class action complaint. (Motion, p. 7:26-8:21.) The *Guy* Court adopted
 11 the rule in the FLSA collective action context where the statute of limitations is
 12 tolled from the filing of the initial collective action complaint until the deadline to
 13 file Consent to Join forms. (*Guy*, 2023 U.S. Dist. LEXIS 208546, at *12-13.) The
 14 court's reasoning for doing so relied upon *Clark*, which is not followed in the Ninth
 15 Circuit, and which has a single step for collective action certification using a
 16 heightened "strong likelihood" standard. Plaintiffs do not provide any case law in
 17 the Ninth Circuit to support its argument that this Court should adopt an equitable
 18 tolling rule for FLSA collective actions like in *Guy*. As stated in this Court's order,
 19 "the statute of limitations on a putative class member's FLSA claim continues to
 20 run in the time between the filing of the collective action complaint and the filing of
 21 their written consent opting in." (Dkt. No. 32, pp. 6-7, citing *Coppernoll v.*
 22 *Hamcor, Inc.*, C 16-05936, 2017 WL 1508853, at 1* (N.D. Cal. Apr. 27, 2017).)

23 Furthermore, a class action pursuant to Rule 23 is distinct from a FLSA
 24 collective action and, as a result, in the Ninth Circuit, "mimicking the Rule 23
 25 standards in evaluating section 216(b) collective action is not appropriate."
 26 (*Campbell*, 903 F.3d 1090, 1113.) "In a class action, once the district court certifies
 27 a class under Rule 23, all class members are bound by the judgment unless they opt
 28 out of the suit. By contrast, in a collective action each plaintiff must opt into the suit

1 by ‘giv[ing] his consent in writing.’” (*McElmurry v. U.S. Bank Nat'l Ass'n*, 495 F.3d
 2 1136, 1139, citing 29 U.S.C. § 216(b).) Unlike in the Sixth Circuit, in the Ninth
 3 Circuit, collective action certification requires no discovery, and a motion for
 4 collective action certification can be filed on or around the time the collective
 5 action complaint is filed, which allows plaintiffs to opt-in to the action on a
 6 shortened time line. In the Sixth Circuit, motions for collective certification require
 7 discovery, so a tolling rule as set forth in *Guy* is more appropriate in that context to
 8 preserve the potential plaintiffs’ rights. Here, the Court should not grant Plaintiffs’
 9 motion to toll the statute of limitations because Plaintiffs could have filed their
 10 Motion for Conditional Certification of FLSA Collective Action on or around the
 11 time of the filing of the collective action complaint on March 8, 2023 and equity
 12 does not require tolling based on Plaintiffs failure to do so.

13 **V. OTHER BASES AGAINST GRANTING PLAINTIFFS’**
 14 **MOTION**

15 Several other bases support this Court’s denial of Plaintiffs’ Motion. As an
 16 initial matter, Plaintiffs Motion fails to conform to the requirements of Local Rule
 17 11-6.2 and this Courts Standing Order, Docket No. 10. Local Rule 11-6.2 requires
 18 the any memorandum of points and authority, including pretrial briefs, contain a
 19 Certificate of Compliance. This Court’s Standing Order states that filings that do
 20 not conform with to the Local Rules will not be considered. (Dkt. No. 10, p. 5:18-
 21 19.) Plaintiffs’ Motion does not contain a Certificate of Compliance and should not
 22 be considered on that basis.

23 Additionally, as set forth in Defendants’ Reply (“Reply”) to Plaintiffs’
 24 Opposition to Defendants’ Motion for Summary Judgment (“MSJ”), Defendants
 25 thoroughly addressed the inapplicability of equitable tolling to this case, to which
 26 Plaintiffs stated they would bring a standalone motion for equitable tolling and did
 27 not address the merits of Defendants’ arguments. (Dkt. No. 48, p. 5:25-7:2) Also as
 28 set forth in Defendants’ Reply, the case Plaintiffs cite to support the purported need

1 to move for equitable tolling in standalone motion, *Allen v. Beard*, 2019 WL
 2 2501925, at fn. 3 (S.D. Cal. June 7, 2019), is not applicable because it discusses
 3 that fair notice requires that new claims and grounds for relief may not be raised in
 4 opposition to summary judgment and does not discuss equitable tolling. (Dkt. No.
 5 6:14-20.) The Plaintiffs here are not raising a new cause of action that requires a
 6 standalone motion. Further, equitable tolling can be raised in an opposition to
 7 summary judgment.² The Court should not entertain Plaintiffs' motion as it an
 8 attempt to evade the page and word limit of its opposition to the MSJ.

9 Finally, the principles underlying judicial estoppel compel denial of
 10 Plaintiffs' motion. The Ninth Circuit has cautioned against reducing judicial
 11 estoppel to a single set of factors. (*See Ah Quin v. County of Kauai DOT*, 733 F.3d
 12 267, 270 (9th Cir. 2013).) However, it has observed three factors that typically
 13 considered by courts in deciding whether to apply judicial estoppel,

14 First, a party's later position must be 'clearly inconsistent' with its earlier
 15 position . . . Second, courts regularly inquire whether the party has succeeded
 16 in persuading a court to accept that party's earlier position, so that judicial
 17 acceptance of an inconsistent position in a later proceeding would create the
 18 perception that either the first or the second court was misled . . . A third
 19 consideration is whether the party seeking to assert an inconsistent position
 20 would derive an unfair advantage or impose an unfair detriment on the
 21 opposing party if not estopped.

22 (*Id.*, citing *New Hampshire v. Maine*, 532 U.S. 742, 750, 121 S. Ct. 1808, 149 L.
 23 Ed. 2d 968 (2001).)

24
 25
 26
 27 ² For example, cases where tolling was argued to oppose an MSJ include *Oracle Am., Inc. v. Hewlett Packard Enter. Co.*, 971 F.3d 1042, 1048 (9th Cir. 2020) and
 28 *Love v. Harsh Inv. Corp.*, 1993 U.S. App. LEXIS 973, at *3-4 (9th Cir. 1993).

1 The factors relied upon in the Ninth Circuit in determining the applicability
2 of judicial estoppel are not “inflexible prerequisites or an exhaustive formula,”
3 rather “[a]dditional considerations may inform the doctrine’s application in specific
4 factual contexts.” (*Id.* at 270-71.)

5 Here, Plaintiffs take a clearly inconsistent position related to their argument
6 for equitable tolling. Through their Motion for Conditional Certification of FLSA
7 Collective Action, Plaintiffs already asked the Court to equitably toll the statute of
8 limitations to the date the motion was filed. (Dkt. No. 27, p. 16:8-9.) Now, in a
9 clearly inconsistent position, Plaintiffs argue that the statute of limitations should be
10 equitably tolled to the date the collective action complaint was filed. *Guy* does not
11 provide support for Plaintiff’s inconsistent position since it is not applicable in the
12 Ninth Circuit. Additionally, Plaintiffs argue that a request for equitable tolling must
13 be brought in a standalone motion, but through their Motion for Conditional
14 Certification of FLSA Collective Action, Plaintiffs requested that the Court
15 equitably toll the statute of limitations. Plaintiffs provide no reason for their clearly
16 inconsistent position that a request for tolling requires a standalone motion. If the
17 Court were to consider this Motion and grant the Motion, which it should not for
18 the reasons set forth above, an unfair detriment would be imposed on Defendants
19 and Plaintiffs would derive an unfair advantage because Plaintiffs’ had the
20 opportunity to address Defendants’ arguments through their Opposition to the MSJ,
21 but did not in an attempt to circumvent the word and page limitations of their
22 Opposition. Further, the Court already denied Plaintiffs’ request for equitable
23 tolling in connection with their preliminary certification motion. Plaintiffs do not
24 provide any new facts to warrant the application of equitable tolling. Defendants
25 would be unfairly disadvantaged if the Court changes course and applies equitable
26 tolling.

27 **VI. CONCLUSION**

28 For the forgoing reasons, Defendants respectfully request that the Court deny

1 Plaintiff's Motion for Relief, with prejudice.

2 Dated: May 13, 2024

3 LIEBERT CASSIDY WHITMORE

4

5 By: /s/ Victor D. Gonzalez

6 Geoffrey S. Sheldon
7 Elizabeth T. Arce
8 Alex Y. Wong
9 Victor D. Gonzalez
10 Attorneys for Defendants
11 COUNTY OF LOS ANGELES
12 and ANTHONY C. MARRONE

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LIEBERT CASSIDY WHITMORE
A Professional Law Corporation
6033 West Century Boulevard, 5th Floor
Los Angeles, California 90045

1 **CERTIFICATE OF COMPLIANCE**
2

3 The undersigned counsel of record for County of Los Angeles and Anthony
4 C. Marrone, certifies that this brief contains 3,302 words, which complies with the
5 word limit of LR. 11-6.1.

6 Dated: May 13, 2024

7 LIEBERT CASSIDY WHITMORE

8 By: /s/ Victor D. Gonzalez

9 Geoffrey S. Sheldon
10 Elizabeth T. Arce
11 Alex Y. Wong
12 Victor D. Gonzalez
13 Attorneys for Defendants
14 COUNTY OF LOS ANGELES
15 and ANTHONY C. MARRONE

16
17 LIEBERT CASSIDY WHITMORE
18 A Professional Law Corporation
19 6033 West Century Boulevard, 5th Floor
20 Los Angeles, California 90045
21
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23
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